In the High Court of Punjab and Haryana at Chandigarh

C.W.P. No. 1717 of 2007

Date of Decision: 19.2.2007

Punjab Ex-Servicemen Corporation

…Petitioner

Versus

Union of India and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. A.K. Chopra, Senior Advocate, with
Ms. Rupa Pathania, Advocate,
for the petitioner.

Mr. Sanjeev Kaushik, Advocate,
for the respondents.

JUDGMENT

M.M. KUMAR, J.

This is a petition filed under Article 226 of the Constitution for quashing orders dated 6.10.2006 (P-7), 25.4.2005 (P-4) and 29.11.2004 (P-2), passed by respondent Nos. 2 to 4, raising a demand of Rs. 55,07,238/- from the petitioner as service tax under the provisions of Section 73(2) of the Finance Act, 1994 (hereinafter referred to as 'the Finance Act'), along with interest and also imposing penalty amounting to Rs. 55,07,238/- under Sections 76, 77 and 78 of the Finance Act. The petitioner has also prayed for

quashing of letters dated 15.1.2007 and 24.1.2007 (P-8 and P-10), issued by the Superintendent Central Excise Range-III (respondent No. 5), whereby the petitioner has been directed to deposit the aforementioned service tax, interest and penalty. Further relief has been sought seeking directions to the respondents to exempt the security services provided by the petitioner from the purview of 'service tax' being charged under the provisions of the Finance Act or to grant time to the petitioner to recover the same from the institutions/offices to whom such services have been provided by the petitioner and then to make payment to the respondents in instalments.

Facts of the case may first be noticed. The petitioner in the instant petition, namely, Punjab Ex-Servicemen Corporation is a body corporate established by the Government of Punjab under the Punjab Ex-Servicemen Corporation Act, 1978 (for brevity, 'the 1978 Act') which became operational in the year 1979. The petitioner is engaged in planning, promoting and undertaking programmes such as providing financial assistance to ex-servicemen, agricultural development, marketing, processing etc. and the main object of the petitioner is stated to be the welfare and economic upliftment of ex-servicemen in the State. The petitioner is also engaged in rehabilitating the ex-servicemen by providing them jobs as security personnel in the Public Sector Undertakings/offices to guard property and person.

It is appropriate to mention here that Chapter V and V-A of the Finance Act deals with Service Tax and vide notification dated 7.10.1998, security agency services were brought within the ambit of

Service Tax liability w.e.f. 16.10.1998. The petitioner was issued Certificate of Registration on 7.12.1998 under the provisions of the Finance Act and respondent No. 5 directed the petitioner to file returns for the period from 16.10.1998 to 31.3.1999. The said returns were required to be filed by 3.8.1999. On 4.8.1999, the petitioner submitted to the concerned authority that it was not liable to pay any service tax on the security services being provided by it, inasmuch as, the petitioner did not fall under the head 'commercial concern' as it was primarily engaged in the welfare and social upliftment of ex-servicemen in the State of Punjab. It has been asserted that on 22.4.2004 after a protracted correspondence, a notice was issued to the petitioner by respondent No. 4 to show cause as to why under Section 68 read with Section 73(1)(a) of the Finance Act, an amount of Rs. 55,07,238/- for the period October, 1998 to 31.12.2002 be not recovered as service tax, alongwith interest under Section 75 & penal action under Sections 76, 77 and 78 of the Finance Act be not taken against it (P-1). The relevant portion of the show cause notice is extracted as under:-

> " From the above, it is evident that the noticee have short paid service tax to the tune of Rs. 55,07,238/- details as per Annexure-IV attached which is recoverable from them under Section 73 of the Act by invoking the extended period of 5 years as they had suppressed these facts from the department with an intent to evade the payment of service tax and thus contravened the provisions of Section 68 of the Act read with rule 6 of

the Rules. Noticee has also failed to file the half yearly ST-3 return under Section 70 of the Act read with rule 7 of the Rules, for the period from 16.10.1998 to 31.3.2003. Thus the noticee have also rendered themselves liable to penal action under Section 76 of the Act for failure to pay service tax, under Section 78 of the Act for suppressing the value of taxable service and under Section 77 of the Act for failure to file the prescribed ST-3 return. The notice were required to pay service tax on monthly basis in terms of provisions of Section 68 of the Act read with rule 6(1) of the rules which they have not paid and thus are liable to pay interest in terms of Section 75 of the Act on the amount of service tax already paid by them as per Annexure I as well as on the amount of service tax short paid and recoverable from them.

Now, therefore, M/s Punjab Ex-Servicemen Corporation, SCO No. 89-90, Sector 34-A, Chandigarh, are hereby called upon to show cause to the Deputy Commissioner, Central Excise Commissioner, Chandigarh-1 within 30 days from the receipt of this notice as to why:

a) they should not pay an amount of Rs. 55,07,238/- under Section 68 read with Section 73(1)(a) of the Act being service tax short paid recoverable from them;

b) the interest chargeable under Section 75 of the Act should not be demanded and recovered from them, which is likely to go up further till the amount of service tax is paid in total in the Govt. account.

c) The penal action under Section 76, 78 and 77 of the Act should not be taken against them for violation of different Sections and rules of the Act/rules as discussed above.

The noticee should produce at the time of showing cause all the evidence, documentary or otherwise, upon which they intend to rely in support of their defence.

The noticee should indicate in their written reply whether they wish to be heard in person or through their legal representative before the case is adjudicated. If no mention is made in their written reply, it would be presumed that they do not wish any personal hearing.

The noticee should further note that in case no cause is shown against the action proposed to be taken within a period of 30 days if they do not appear before the adjudicating authority when the case is posted for hearing, the case would be decided exparte on the basis of evidence already available on records."

On 7.6.2004, the petitioner sent a detailed reply to the show cause notice taking the stand that the object of the petitioner was not profit making nor there was any dividend clause and whatever funds had been received, were utilized for the welfare of ex-

servicemen. It is stated to have taken legal opinion to the effect that no service tax was liable to be paid because it did not fall within the ambit of 'commercial concern'. It was requested that proceedings against the petitioner be dropped. It was also intimated that the petitioner had already deposited Rs. 2.5 crores during the last 6 to 8 months and was not in a financial position to deposit huge amount immediately. The permission to deposit the amount in five monthly instalments of Rs. 10 lacs each was sought. On 18.11.2004, the petitioner intimated to respondent No. 4 that Rs. 4,29,989.40 on account of alleged service tax was not payable as the same pertained to the salaries paid to the drivers for the financial years 2000-01, 2001-02 and 1.4.2002 to 31.12.2002.

On 29.11.2004, Deputy Commissioner, Central Excise Division, Chandigarh (respondent No. 4) passed an order and confirmed the demand amounting to Rs. 55,07,238/- from October, 1998 to 31.12.2002, along with interest and personal penalty amounting to Rs. 55,07,238/- (P-2).

On 14.2.2005, the petitioner filed an appeal under Section 85 of the Finance Act before the Commissioner (Appeal) – respondent No. 3. Along with the appeal, an application was also filed for grant of ad-interim stay. On 14.3.2005, respondent No. 3 passed an order (P-3) and waived of the condition of pre-deposit under Section 35-F of the Central Excise Act, 1944, on deposit of rupees ten lacs, by observing as under:-

> " I have gone through the case records very carefully. On the basis of preliminary scrutiny of the case records and on the basis of due consideration of the

merit of the case, I find that prima facie the major portion of the demand is time barred and the wages of Drivers and the Security men have also been included in the amount shown towards Service Tax. I, therefore, waive the condition of pre-deposit under Section 35F, on the appellant paying an amount of Rs. 10,00,000/- (Rupees Ten Lakhs only). The appellant will file evidence regarding fulfillment of this condition within 15 days of the receipt of this order failing which their appeal will be dismissed without any further reference to them."

The petitioner, however, deposited Rs. 7 lacs and requested for hearing of appeal without insisting on deposit of balance amount of Rs. 3 lacs. Vide an order dated 25.4.2005 (P-4), respondent No. 3 dismissed the appeal of the petitioner by observing as under:-

" I have carefully examined the case records including the Appellants submissions made in writing and at the time of personal hearing and observe that the main ground taken by the Appellant is that the demand in question is time barred. But the same grounds were not taken before the Adjudicating Authority. Moreover the Appellant never co-operated with Department in supplying the information as required by the Range Officer through his letters written from 27.7.1999 onwards. Hence the Appellant tried to suppress the

> required information to evade Service Tax. The provision of extended period have, therefore, been correctly invoked by the Adjudicating Authority. On merits I fully agree with the findings of the Adjudicating Authority in as much as the Appellant are the service providers and provide service against proper payments and as such function at par with any business or commercial establishment. The Order-in-Original is upheld.
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> The appeal is dismissed."

On 17.5.2005, the petitioner again received a demand notice from respondent No. 4 for deposit of an amount of Rs. 55,07,238/- along with interest and Rs. 55,07,238/- towards penalty imposed. Against the order dated 25.4.2005, the petitioner filed an appeal, dated 21.7.2005, before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (P-5). For hearing the appeal on merits, the Tribunal considered the deposit of Rs. 7 lacs as sufficient, which the petitioner had deposited at the time of hearing of appeal by respondent No. 3. On 4.10.2006, the petitioner moved an application (P-6) before the Tribunal seeking an adjournment on the ground that the counsel for the petitioner was not able to attend the hearing of the case being indisposed. The Tribunal, however, proceeded to decide the appeal in the absence of the counsel for the petitioner and the same was dismissed vide order dated 6.10.2006 (P-7). On 15.1.2007, the petitioner again received a notice from respondent No. 5 for deposit of the aforementioned amount of service tax along with

interest as well as amount of penalty imposed (P-8). On 19.1.2007, petitioner made a request to respondent No. 5 that the amount of Rs. 7 lacs deposited on 18.3.2005 and Rs. 3,78,009/-, which was deposited on different occasions (total Rs. 10,78,009/-) be deducted from Rs. 55,07,238/-. A further request was made by the petitioner for grant of two months time to collect the pending payment of service tax from its clients and then to deposit the same with the department (P-9). On 24.1.2007, the petitioner again received a notice from respondent No. 5, intimating that amount of Rs. 10,78,009/- has been deducted from the payable amount, however, the request of the petitioner to defer the payment of service tax was declined (P-10). It has been asserted that the petitioner is yet to recover service tax, amounting to Rs. 50,60,070/- from its clients, majority of which are Government Undertakings. It has also been pleaded that when the petitioner entered into agreement with its clients prior to 7.10.1998, the security providers were not brought within the purview of service tax and, thus, there is no such clause in the aforementioned agreements. In these circumstances, the petitioner has filed the instant petition challenging orders Annexures P-2, P-4 and P-7 as also letters Annexures P-8 and P-10.

In the written statement filed on behalf of respondent Nos. 1 to 5, the stand taken is that the writ petition under Article 226 is not maintainable, inasmuch as, an alternative efficacious remedy under the provisions of Section 35H of the Central Excise Act, 1944, is available to the petitioner. The other ground taken is that once the petitioner itself has admitted that it is liable to pay service tax, then

there remains nothing in the petition and the petitioner is liable to pay service tax. The factual matrix as mentioned in the writ petition has, however, been admitted in the written statement.

After hearing learned counsel for the parties, we are of the considered view that present petition deserves to be allowed. At the outset Mr. A.K. Chopra, learned Senior counsel for the petitioner has argued that while deciding the appeal of the petitioner, the Tribunal has not considered the ground of limitation as taken in para no. (IV) of the grounds of appeal (P-5). For ready reference, para (IV) of the grounds of appeal is reproduced as under:-

> "IV. THAT in any case in any view of the matter, the demand for service tax raised for the period October 1998 to December 2000 alleging suppression and thus invoking provisions of Section 73 of the Act is time barred as the matter pertaining thereto for not depositing service tax after getting certificate of registration dated 7.12.98 issued by the Assistant Commissioner, Central Excise Division, Chandigarh and also not filing the half yearly returns (ST-3 returns) before the Superintendent (Service Tax), Central Excise Division, Chandigarh for which no notice for penal action had been issued to the appellant was well within the knowledge of the department. It may be mentioned here that in response to the letter dated 29.7.1999 issued by the Superintendent (Service Tax) directing the

> appellant to file ST-3 returns for the period October 98 to March 1999 by 3.8.1999, the appellant submitted that no service tax is payable in respect of the security service rendered by them being not a commercial concern. However, since the appellant were not complying to the directions issued by the department, the provisions of the Section 14 of the Act could have been invoked for raising short payment of service tax within the time laid under Section 73 of the Act. It was only on the basis of protracted correspondence with the department, a notice was issued alleging suppression of facts for evasion of service tax. That being so, since the short payment of service tax was well within the knowledge of the department, the notice for demand thereto is time barred. ……"

We specifically confronted the learned counsel for the respondents to show that the argument raised by the petitioner is incorrect or that the plea of the petitioner in respect of the period of limitation, as raised in the quoted para, has been dealt with by the Tribunal in its order dated 6.10.2006 (P-7). However, no satisfactory explanation has been given and on perusal we find that the issue has not been dealt with.

In light of the above mentioned facts, we find that the contention raised by the petitioner is meritorious and is liable to be accepted. The Tribunal while passing the impugned order dated

6.10.2006 (P-7) has failed to consider the ground of limitation taken in para No. (IV) in the Grounds of Appeal (P-5). Therefore, we set aside the impugned order dated 6.10.2006 (P-7) and remand the matter back to the Tribunal with a direction to consider the ground of limitation as well as any other ground which might have escaped its notice. The Tribunal shall take a fresh decision after hearing both the parties afresh. The parties through their counsel are directed to appear before the Tribunal on 12.3.2007.

A copy of the order be given dasti on payment of usual charges.

(M.M. KUMAR)
JUDGE

(RAJESH BINDAL)
JUDGE

February 19, 2007

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